IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-333

JAMES W. WELLHAM, an Individual, CHANNING-HAMILTON CORPORATION, a Corporation,
Petitioners,

v.

UNION BANK, a Banking Corporation, CITIZENS AND SOUTHERN NATIONAL BANK, a Banking Corporation, SECURITY PACIFIC NATIONAL BANK, a Banking Association, CROCKER NATIONAL BANK, a Banking Association, BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION, a Banking Association, CENTURY BANK, a Banking Association, EUGENE HARTER, an Individual, MARC WEISMAN, an Individual, STEVEN FRIED, an Individual, RICHARD DOMINGUEZ, an Individual, DOES I Through X, Inclusive,
Respondents.

(CITIZENS AND SOUTHERN NATIONAL BANK, Real Party in Interest)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The unreported opinion of the United States District Court for the Central District of California, which transferred Peti

tioners' action against Respondent to the United States District Court for the Southern District of Georgia, is duplicated in the Appendix to the Petition. The unreported opinions of the United States Court of Appeals for the Ninth Circuit dismissing Petitioners' appeal and denying Petitioners' petition for rehearing are also duplicated in the Appendix to the Petition. The unreported order of the United States Court of Appeals for the Ninth Circuit denying Petitioners' petition for writ of mandamus, which order was not duplicated in the Appendix to the Petition, is duplicated in the Appendix to this Brief.

JURISDICTION

The requisites for invoking the Court's jurisdiction are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. **Whether a District Court's Order Transferring an Action to Another District Court for Lack of Proper Venue Is a Final, Appealable Order.**

2. **Whether Venue in an Antitrust Suit Brought Against a National Banking Association Is Governed by the Venue Provision of the National Bank Act, 12 U.S.C. § 94, Rather Than by the Venue Provision of the Clayton Act, 15 U.S.C. § 22.**

STATUTES INVOLVED

28 U.S.C. § 1291: Final Decisions of District Courts

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of

> the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

12 U.S.C. § 94: Venue of Actions

> Suits, actions and proceedings against any association under this title [National Banks] may be had in any district, or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

15 U.S.C. § 15: Suits by Persons Injured; Recovery of Treble Damages

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 22: District in which to Sue Corporation

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is accurate.

ARGUMENT

I. The Decision of the Ninth Circuit Below Is Correct and Consistent With That of All Other Circuit Courts of Appeals Which Have Held That an Order of Transfer for Improper Venue Is Not an Appealable Order.

The District Court transferred this action under 28 U.S.C. § 1406(a), which provides that a District Court may dismiss or "if it be in the interest of justice, transfer . . . [a case in which venue is laid in the wrong district or division] to any district or division in which it could have been brought." Professor Moore has observed that an order under this Section or under 28 U.S.C. § 1404(a) (which authorizes transfer for the convenience of the parties and witnesses) "is an interlocutory order and is non-appealable except by certification under 28 U.S.C. § 1292(b)." 9 *Moore's Federal Practice*, 173-74, ¶ 110.13[6], (2d Ed. 1975) (footnote omitted). Numerous cases footnoted by Professor Moore reveal the consistency with which the Circuit Courts of Appeals have followed the rule stated by Professor Moore. *Id.* at footnote 3.

Only one case has been found in which appellate review under 28 U.S.C. § 1291 was permitted for the denial or issuance of a transfer order. That case was *United States v. Berkowitz*, 328 F.2d 358, 360 (3d Cir.), *cert. denied*, 379 U.S. 821 (1964). As both the Eighth Circuit and Professor Moore have explained, *Berkowitz* was and should remain unique. Appeal was allowed in the case only because the denial of the transfer order effectively terminated the lawsuit. The defendant was immune from service in the district court where the suit was instituted and could assert the statute of limitations as an insurmountable defense to any new suit in another district. For the distinction, see *Fischer v. First National Bank*, 466 F.2d 511 (8th Cir. 1972); 9 *Moore's Federal Practice* 174, ¶ 110.13[6] n.5 (2d Ed. 1975). In no way are the *Berkowitz* facts replicated in the instant suit.

Having failed in the first instance to seek certification of an appeal under 28 U.S.C. ¶ 1292(b), and having had their petition for writ of mandamus denied and their subsequent appeal dismissed by the Ninth Circuit, Petitioners seek to avail themselves of the exception first recognized by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). As Professor Moore has observed, however, "[t]he courts of appeals have thus far resisted attempts to import the *Cohen* rule into the area of review of transfer orders, and it is to be hoped that they will continue to do so." 9 *Moore's Federal Practice*, 174, ¶ 110.13[6] (2d Ed. 1975).

> "It is perfectly true that in the nature of things the right of appeal from transfer orders is often illusory if appeal must await final judgment. Far more illusory, however, is the notion that permitting an immediate appeal as a right from such orders will serve the interests of any except those for whom delay is victory. The vast majority of appeals would be foredoomed to failure. More than two decades of review by mandamus have produced only a relative handful of reversals, and reversals for incorrect evaluation of proper factors (abuse of discretion) is very rare. Troublesome questions of the interpretation of the transfer statutes have been largely resolved. Those yet to be encountered can be resolved by recourse to 28 USC § 1292(b). Mandamus can reach 'those cases . . . where a district judge has denied a transfer motion without even considering the merits or has granted one in such flagrant defiance of accepted principles as to evidence impermissible motivation'." *Id.* at 174-75.

Notwithstanding Petitioners' failure to seek certification of an appeal under 28 U.S.C. § 1292(b) and the Ninth Circuit's denial of the writ of mandamus sought by Petitioners, this case presents no circumstances justifying application of the *Cohen* rule. Petitioners seek to raise the spectre of being com-

pelled to prosecute their claims in three different district courts, the unstated inference being that Section 12 of the Clayton Act (15 U.S.C. § 22) confers upon Petitioners the right to maintain all of their antitrust claims against the various Respondents in a single district court. Section 12 of the Clayton Act, however, confers no such right. Quite the contrary, Section 12 of the Clayton Act enables Petitioners to bring their antitrust action against Respondent only in the judicial district in which the Respondent "is an inhabitant", where Respondent "may be found", or where Respondent "transacts business". Expansive as they are, these venue parameters of the Clayton Act do not guarantee Petitioners a trial of their action in a single forum.

In actuality, Petitioners never carried their burden of establishing with respect to Respondent the existence of proper venue under Section 12 of the Clayton Act in the Central District of California. Although Respondent premised its original motion to dismiss or transfer Petitioners' action for lack of proper venue upon the venue provision of the National Bank Act, 12 U.S.C. § 94, in the face of Respondent's motion the Petitioners never established any factual basis for venue under Section 12 of the Clayton Act. Indeed, Respondent was not chartered in the Central District of California, and was not at the time the Petitioners filed their complaint or since then operating any branches in the Central District of California or transacting any business in the Central District of California. Respondent's responsive pleadings, filed in the Southern District of Georgia following transfer of the action, denied all of the Petitioners' jurisdictional and venue allegations respecting Respondent. Furthermore, even the record of service respecting the service of the Petitioners' Complaint upon the Respondent discloses that, in the absence of any officer or agent in California, service of the Complaint was made upon an officer of Respondent at its main office in Atlanta, Georgia. These factors, coupled with the inherent multi-district nature of many anti-

trust actions, belie the existence of any compelling reason for the application of the *Cohen* exception to the general non-appealability of transfer orders.

II. Venue in the Petitioners' Action Against the Respondent Is Governed by the Venue Provisions of the National Bank Act, 12 U.S.C. § 94.

Petitioners insist that the general venue provision in Section 12 of the Clayton Act, 15 U.S.C. § 22, takes precedence over the more specific and earlier-enacted venue provisions of 12 U.S.C. § 94 when national banking associations such as the Respondent are named as defendants in antitrust actions. Admittedly, the issue for which review is sought is a narrow and somewhat novel one. It does not, however, warrant review by the Court. There is no conflict of decisions among the circuit courts of appeals. Indeed, though the Petitioners urge that the issue is one of national importance, the Petitioners conceded in the District Court that, despite the passage of some sixty-four years since the enactment of Section 12 of the Clayton Act, the Petitioners have "been unable to find any case in any Court which concerns itself with this question." Notwithstanding the lack of precedent on this issue or the apparent infrequency with which it arises, the Petition should be denied simply because the arguments raised by the Petitioners were answered by the Court in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).

In the District Court the Petitioners relied principally on the Third Circuit Court of Appeals decision in *Ronson Corp. v. Liquifin Aktiengesellschaft*, 483 F.2d 852 (3d Cir. 1973). Petitioners used *Ronson* to support their argument that the venue provisions of the Clayton Act relied upon by Petitioners are analogous to the venue provisions of the Securities Exchange Act applied in *Ronson*, since both are broad, expansive, and

substantially similar in content and both were enacted subsequent to the National Bank Act. In responding to these arguments before the District Court, Respondent relied upon the then newly-issued decision of this Court in *Radzanower*.

In *Radzanower*, this Court held that "[t]he narrowly drawn, specific venue provision of the National Bank Act must prevail over the broader, more generally applicable venue provision of the Securities Exchange Act." 426 U.S. 148, 158 (1976). In *Radzanower*, the Court noted that the National Bank Act was designed to meet particularized problems of national banks, while the later-enacted Securities Exchange Act, with its broader venue provision, was designed to deal with a much larger universe of potential defendants. Applying the "basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum" and finding no "clear [congressional intention otherwise", the Court concluded that the specific venue provision of 12 U.S.C. § 94 takes precedence over a more general venue statute. Id. at 153-54.

As the Petitioners so aptly pointed out in their opposition brief in the District Court, the interaction of the general venue provision of the Clayton Act with the special venue provision of the National Bank Act in this case should be analyzed in the same way that the interface between the venue provisions of the Securities Exchange Act and the National Bank Act has been analyzed in other cases. Though the Petitioners have abandoned their analogy to the Securities Exchange Act since the *Radzanower* decision, the Court's reasoning in *Radzanower* applies with equal force to the venue provision of the Clayton Act.

Both Section 12 of the Clayton Act and Section 27 of the Securities Exchange Act are broad federal venue statutes using similar language and dealing with federal regulatory laws which cover a wide universe of potential defendants. Both were enacted long after the National Bank Act. As with Section 27 of the Securities Exchange Act, it is clear that Section 12 of the Clayton Act was not intended expressly to repeal the earlier bank venue statute. It is also obvious that since the vast majority of antitrust actions do not involve national banking corporations, no implicit repeal of 12 U.S.C. § 94 is necessary to make the antitrust laws "work". *Cf. Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155-57 (1976).

Petitioners have listed a number of policy reasons why they believe Section 12 of the Clayton Act should control in this case. In addressing virtually the same policy arguments presented in *Radzanower*, the Court stated that "policy arguments such as these are more appropriately addressed to Congress than to this Court." *Id.* at 156, n.12.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FRANKLIN R. NIX
ALSTON, MILLER & GAINES
Counsel for Respondent

APPENDIX

United States Court of Appeals
for the Ninth Circuit

James W. Wellham, an Individual, Channing-Hamilton Corp., a Corporation, Petitioners, vs. U.S. District Court for the Central District of California, Respondent, Union Bank, a Banking Corp., Citizens and Southern National Bank, a Banking Corporation, Real Parties in Interest.	No. 76-2557

ORDER

(Filed August 9, 1976)

Before: CHOY and SNEED, Circuits Judges.

Upon due consideration, the petition for writ of mandamus filed July 19, 1976 is denied; the motion to stay the transfer is denied as moot.

HUBERT Y. CHOY
JOSEPH T. SNEED
United States Circuit Judges

Mo Cal 7/26/76